IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6528

DAVID WAYNE BURKS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The argument for the United States is fairly summed up in its brief at 11:

> "(W)here the defect at the first trial is based upon a mistake of law rather than upon simple factual insufficiency, or where the prosecutor cannot reasonably be faulted for any factual insufficiency, the interest in accurate resolution of criminal charges outweighs the interest of defendent in avoiding a second trial after conviction at the first."

ARGUMENT

1. THE DEFECT AT THE FIRST TRIAL IS NOT BASED UPON "A MISTAKE OF LAW RATHER THAN SIMPLE FACTUAL INSUFFICIENCY . . ."

Whatever the merits of the "bright line" theory of the United States (Brief 21-36) in other contexts,[1] there is a "bright line" in the present case between insufficiency of the evidence and legal error at the trial. The Government argues:

> "The court of appeals reversed petitioner's conviction principally because the expert witnesses for the prosecution did not give their opinions on the ultimate issue of petitioner's sanity." At 10.

In *United States v. Smith*, 404 F.2d (1968), the Sixth Circuit established a new standard for determining whether at the time of the offense the defendent was capable of criminal responsibility. The standard was well known to the United States.[2] The weight to be

[1] a) Valid misunderstanding of legal rules (example: necessity of interstate nexus in federal firearms offenses, reliance upon statutory inferences later shown to be unconstitutional, variance between indictment and proof in conspiracy cases, scope of judicial notice of essential facts such as sex, national bank charter, etc.).

b) Errors attributable to defendent (example: erroneous charge requested by defendent; refusal of defendent to take mid-trial psychiatric exam).

c) Exclusion of necessary proof by the court.

[2] The order for psychiatric examination set out the three questions required to be answered by the *Smith* rule of the Sixth Circuit. A.7. The defendent at arraignment had pleaded "not quilty by reason of insanity." A.6.

given lay testimony had been discussed by the Sixth Circuit in *United States v. Smith*, 437 F.2d 538 (1970).

There were no evidentiary or substantive surprises, simply a failure by the Government to produce necessary evidence. The Sixth Circuit reversed because the Government failed to produce evidence to satisfy the *Smith* criteria, not simply because the expert witnesses did not give their opinions on the ultimate issue of insanity.

2. THIS IS NOT AN INSTANCE WHERE "THE PROSECUTOR CANNOT REASONABLY BE FAULTED FOR ANY FACTUAL INSUFFICIENCY . . ."

This is the second reason advanced by the United States for granting a new trial. But any reasonable prosecutor would have asked his expert witnesses questions which proved or disproved the ultimate fact. Because there was such a lack of questions by the prosecutor, the ultimate facts were never answered by witnesses called by the United States. The prosecutor was either negligent in not asking the *Smith* questions or shrewd in not asking them because he knew the answers would be unfavorable.[3]

[3] Petitioner is not asserting that these questions need be asked verbatim. The proof on the insanity issue must be directed to the criteria adopted in *Smith*, however.

CONCLUSION

The reversal below was for a failure of proof not attributable to any mistake of law. The prosecutor inexplicably failed to elicit proof of the ultimate issue from the two expert witnesses he called. The court of appeals found the other evidence insufficient. The present case is not within that class of cases in which the United States presents some rationale for a limited right to retrial in insufficiency of the evidence reversals. The present case falls within the general class of cases in which the reversal on appeal was because the evidence was simply insufficient.

Respectfully submitted,

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